Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
Petition of the AT&T for Interim	)	WC Docket No. 08-152
Declaratory Ruling and Limited Waivers	)	
Regarding Access Charges and	)	
the ESP Exemption	)	

To: The Commission

Comments of D&E Communications, SureWest Communications, and Moultrie Independent Telephone Company

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SUMMARY

These Joint Comments are submitted by three rate-of-return carriers, D & E Communications, Inc., SureWest Communications, and Moultrie Independent Telephone Company. While strongly supporting AT&T's proposal that VOIP traffic be declared subject to access charges and that asymmetrical compensation be declared unlawful, the Joint Commenters equally strongly oppose AT&T's suggestion that VOIP traffic should only be subject to intrastate access charges if those charges are no greater than interstate access charges.

The current state of regulatory uncertainty permits VOIP providers to improperly escape the payment of access charges which are properly due from them as beneficiaries of the termination service provided by LECs. This results in one of two untenable scenarios: (1) other network users to have to pick up the economic burdens avoided by the VOIP providers or (2) carriers are forced to lose revenues that are needed to maintain the very networks that are being used by VOIP providers, as well as others. The opportunities for regulatory arbitrage increasingly unbalance the economics of the PSTN and spawn incessant disputes, as LECs seek to recover access charges owed while VOIP providers disclaim liability.

The AT&T proposal fails to solve the problem in part because it limits its application to "telecommunications carriers." Most VOIP providers insist that they are not telecommunications carriers, but rather, information service providers. Alternatively, the VOIP providers claim that their *traffic* is not "telecommunications." A viable solution must declare that the access charge payment obligation applies to VOIP providers regardless of how they denominate themselves or their traffic. One way to accomplish this end is to declare that originating or terminating interexchange traffic received from or delivered to the PSTN through a LEC by means of any format or technology is subject to access charges.

The AT&T proposal also fails because it attempts to limit access charge recovery for intrastate VOIP traffic to circumstances where intrastate access charges are no higher than interstate access charge levels. This proposal makes no logical sense; if VOIP traffic is subject to access charges, those delivering the traffic should have to pay the prevailing and lawful access charge rate regardless of whether it is interstate or intrastate. By attempting to deny LECs the intrastate compensation that would normally be due, AT&T's proposal would create an untenable and confiscatory situation where LECs would not be permitted to recover their costs. This would continue arbitrage in favor of VOIP carriers, skewing the competitive marketplace and allowing such carriers to have an unfair advantage over carriers that properly pay access charges. The fix to this problem suggested by AT&T (raising SLCs and originating interstate access charges) might work for price cap carriers like AT&T, but it will not work at all for rate-of-return carriers and those participating in the NECA interstate pooling system who cannot simply raise rates to recover other revenues lost by the AT&T proposal. For such carriers, the process is a complicated and lengthy one that cannot possibly be applied on a quick "interim" basis. By treating intrastate access charges differently than interstate charges, AT&T's proposal will also create a new opportunity for arbitrage – precisely the problem that needs to be eliminated.

The Joint ROR Commenters' alternative proposal is that VOIP traffic be declared subject to access charges across the board with no exception for intrastate access. Normal intrastate access charges would then apply and a consistent access charge regime would be in place.

To the extent that AT&T is really attempting to amend the Commission's rules by seeking broad waivers applicable to itself and others similarly situated, and by applying different standards to interstate and intrastate access, its petition must be addressed in a formal rulemaking

proceeding rather than via the shortcut attempted here. To the extent that AT&T is seeking to impose caps on intrastate access charges, it is asking the Commission to trespass on the province of state PUCs. The Commission may properly make the declarations suggested above which are broad in their application, but the mechanics of intrastate access charges must be left to the states.

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D&E Communications, Inc. ("D&E"), SureWest Communications ("SureWest"), and Moultrie Independent Telephone Company ("Moultrie") ("Joint ROR Carriers") by their attorneys, hereby file these Comments in response to the Commission's *Public Notice*, DA 08-1725, released July 24, 2008, in the above-captioned proceeding. The joint commenters are rate-of-return carriers that share the concern expressed by AT&T that some industry participants have been abusing the so-called "ESP Exemption" by claiming that it applies to IP-originated voice ("VOIP") traffic terminated on the public switched telephone network ("PSTN"). While the Joint ROR Carriers believe that AT&T has correctly highlighted a significant and rapidly growing problem, they also believe that the specific proposals in AT&T's July 17, 2008 Petition ("*Petition*") not only fail to solve much of the problem, but actually create new avenues for arbitrage by incenting carriers to improperly classify their intrastate traffic as VOIP, in order to avoid lawful access charges. The Joint ROR Carriers oppose the proposals in the *Petition* that would require a local exchange carrier ("LEC") to lower its intrastate access charges for VOIP-originated calls to interstate levels in order to receive intrastate access charges for intrastate

VOIP calls delivered to a LEC for termination on the PSTN. AT&T's proposal (i) would leave LECs with far less compensation and a damaging revenue shortfall for a substantial portion of the traffic that they terminate, and (ii) would likely increase the amount of arbitrage that exists today by creating a dangerous incentive for insidious carriers and others who could – and would – suddenly classify their terminating traffic as VOIP in order to eliminate their expenses for terminating traffic on the PSTN. The Joint ROR Carriers are also concerned that the declaration requested by AT&T, *i.e.*, that access charges apply to IP-PSTN traffic that is delivered by a telecommunications carrier to a LEC, misses the very essence of the problem: many VOIP providers are attempting to avoid paying access charges by claiming that they are not "telecommunications carriers" and/or that their traffic is not "telecommunications."

I. Introduction

D&E is an integrated communications provider offering local and interexchange voice, high-speed data, Internet access, and multichannel video services. D&E has been serving customers in central Pennsylvania for more than 100 years. D&E's core business has always been its operations as a rural incumbent local exchange carrier ("RLEC"), though in 1998, it began competitive local exchange carrier operations as well.[1]

SureWest is a holding company with telecommunications subsidiaries that operate in northern California, Kansas and Missouri. SureWest's current subsidiaries provide incumbent local exchange, competitive local exchange, interexchange, multichannel video, and broadband data services. SureWest Telephone is an incumbent local exchange carrier ("ILEC") operating solely in California, serving only one study area of 83 square miles with two wire centers. SureWest Telephone's operations currently serve about 104,000 access lines.

[1] As of December 31, 2007, D&E served over 170,000 RLEC and CLEC access lines.

Moultrie Independent Telephone Company is a 635 line local exchange carrier operating wholly within Moultrie County, Illinois. It has a single 39 square mile exchange area serving the rural community of Lovington, Illinois, and its surrounding farming area.

All three of these carriers are regulated as rate-of-return ("ROR") companies. All three of these companies have built their strong reputations by providing high-quality, dependable and affordable services to their customers. In many of their service areas, they are the carrier of last resort ("COLR") yet are faced with multiple competitors for the provision of telephone services (e.g. wireless, cable VOIP, non facilities VOIP, and other wireline providers) that are not the COLR. Part of taking COLR responsibilities seriously is a commitment to maintaining a high quality network. But maintaining a high quality network requires resources, and carriers that use the ILEC network to terminate traffic must contribute their proper share of the cost of maintaining that network. Unfortunately, in the last few years, the rapidly growing independent VOIP industry has focused primarily on avoiding costs. The primary tool for this cost avoidance has been the wide spread practice by numerous VOIP carriers of refusing to pay access charges to the LECs for VOIP interexchange calls that terminate on the PSTN. The usual gambit employed by VOIP carriers in avoiding access charges is to claim that because the provision of VOIP is allegedly a Title I "information service," rather than a Title II "telecommunications service," the VOIP carrier is exempted from paying access charges under the Commission's ESP Exemption. The Joint ROR Carriers receive such claims increasingly more often every year. For example, at this point unpaid access charges rightfully due to D&E from VOIP providers average over $13,000 per month. For a rural LEC of D&E's size, this is a significant amount of money, and on a nation-wide basis, these unrecovered costs cannot be allowed to continue without significant degradation of the PSTN. Because VOIP traffic is regularly converted to

TDM format before delivery to Joint ROR Carriers for termination, it is, from their standpoint, indistinguishable from any other terminating traffic. Indeed, the process, cost and burden involved in delivering the call to its destination is the same as for any normal PSTN to PSTN call. Yet the VOIP carriers disclaim any obligation to pay for the terminating service received.

Under current law, all IP interexchange calls terminated by a LEC on the PSTN should be subject to normal access charges.[2] The "ESP Exemption" does not and was never intended to exempt an IP-based provider of telephone services or its carrier partner from paying terminating access charges when it terminates an interexchange call not to its own database or other information sources, but rather to the plain old telephone service ("POTS") customer of a LEC on the PSTN. Nevertheless, VOIP providers regularly make contrary claims in order to avoid paying access charges. This claim, that the provision of VOIP is allegedly an information service rather than a telecommunications service, is nothing more than a pernicious form of regulatory arbitrage. Such arbitrage harms consumers by limiting the ability of LECs to properly recover the costs of terminating traffic and maintaining the PSTN that all consumers rely on, regardless of whether the calls are originated in IP or TDM format. To the extent that LECs can recover all of their costs, while VOIP providers blithely coast on the coat tails of responsible carriers, the remaining users of the PSTN must pay a disproportionately higher share of the cost of maintaining the network, resulting in higher access charges and ultimately higher cost of service to end users. Realistically, however, because of the actions of VOIP providers, LECs are not recovering all of their costs of terminating traffic, and are consequently disadvantaged in their efforts to maintain the integrity of the networks that all users rely on, including VOIP

[2] For a full discussion of this issue, *see, e.g.* D&E's February 20, 2008 Comments in WC Docket 08-08 in support of the Embarq Petition for Forbearance from enforcement of the "ESP Exemption."

providers. This is simply a matter of establishing a level playing field for all competitors that use the PSTN. Even though the intercarrier compensation regime needs reform, all providers should be required to follow the current FCC rules and policies on compensation until the regulatory regime is reformed. Otherwise, the competitive marketplace is skewed by arbitrage which improperly favors one class of competitors.

The Joint ROR Carriers also share AT&T's concern regarding "asymmetrical arbitrage" by certain CLECs that insist on paying under a reciprocal compensation regime for interexchange IP-to-PSTN traffic that they deliver to a LEC for termination, but nevertheless demand the payment of access charges for PSTN-to-IP traffic delivered to them. There is no legal, practical or logical support for such an approach, and leaving this growing problem unresolved will only lead to further undercutting of the PSTN, and unnecessarily higher charges on classes of customers whose carriers do not perpetrate these pernicious arbitrage schemes.

II. Addressing IP-PSTN Interexchange Traffic, and the Flaws in the AT&T *Petition*.

The Joint ROR Carriers, like many carriers, believe that the current inter-carrier compensation ("ICC") regime is "Byzantine and broken," as it creates numerous opportunities for unfair regulatory arbitrage, and provides too many incentives for inefficient investment and deployment decisions. These effects of the existing ICC regime have been particularly exacerbated by the Commission's inability to address the appropriate compensation that applies to the growing amount of IP-PSTN traffic. Regulatory inaction has led to an increasing morass of disputes between VOIP providers and LECs. Those disputes have been played out not only to

litigation in courts, but also recently in dueling forbearance petitions filed with the Commission by Feature Group IP and Embarq.[3]

The Joint ROR Carriers are strong supporters of the idea that, due to the widespread problem of regulatory arbitrage, the most rational and effective ICC reform would involve a comprehensive plan covering all carriers and all traffic. On this, at least, the Joint ROR Carriers agree with AT&T. Something must be done, and done quickly. D&E and SureWest have been active participants in industry-wide discussions and negotiations over such a comprehensive ICC regulatory regime. There is an urgent need for comprehensive ICC reform to be implemented as soon as possible, especially reform associated with IP-PSTN traffic. Nevertheless, the Joint ROR Carriers recognize that for a wide variety of reasons, the Commission may not be willing or able to enact comprehensive ICC reform in the immediate future. If that is the case, the Joint ROR Carriers strongly urge the Commission to at least address some of the most urgent ICC reform issues now. Permanent reforms are more efficient than interim ones, as they are more likely to remove the regulatory uncertainty that clouds all carriers' abilities to make informed business decisions. However, if an interim reform is the only way that the Commission can take immediate action on the urgent need to address the compensation of IP-PSTN traffic, then the Joint ROR Carriers support an interim solution, provided that such solution is rational and fair.

Any rational and fair solution to the issue of IP-PSTN traffic compensation, even an "interim" solution, 1) must not allow VOIP providers to continue to avoid paying ICC by claiming that they are "information service providers" rather than "telecommunications carriers";

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[3] *In the Matter of Petition of the Embarq Local Operating Companies for Limited Forbearance Under 47 U.S.C. §160(c) From Enforcement of Rule 69.5(a), 47 U.S.C. §251(b) and Commission Orders on the ESP Exemption (WC Docket No. 08-08); Petition of Feature Group IP for Forbearance From Section 2519g) of the Communications Act and Sections 51.701(b)(1) and 69.5(b) of the Commission's Rules,* WC Docket No. 07-256.

2) must not result in new but equally harmful ways in which carriers are denied the opportunity to recover their costs of providing service; and 3) must apply across-the-board for all providers, not just a limited class of carriers. Because the proposals in the *Petition* fail to meet some or all of these three criteria, they may actually *exacerbate* rather than ameliorate the present crisis in access charge compensation. Joint ROR Commenters therefore suggest a modified version of the AT&T plan.

A. Any Commission Ruling Must Make Clear That Access Charges Apply to Interconnected VOIP Providers, Regardless of How Those Providers or Their Traffic are Classified.

The *Petition* seeks a ruling that interexchange IP-PSTN traffic that is delivered by a telecommunications carrier to a LEC for termination on the PSTN would be subject to access charges. The fundamental problem with this proposal, however, is that in order to avoid properly paying access charges, VOIP providers have for years been asserting that they are not telecommunications carriers, but rather are "enhanced service providers" or "information service providers." Alternatively, VOIP providers claim that their *traffic* is enhanced services or information services traffic, rather than telecommunications traffic, and accordingly not subject to access charges.[4] The Commission is well aware of this aspect of the on-going arbitrage schemes of VOIP providers. Thus, the ruling sought by AT&T would likely not solve the problem of access charge avoidance. As AT&T correctly observed, "[t]he applicability of interstate carrier charges does not depend on whether the entity taking service is a common carrier." *HAP Services, Inc. v. Southwestern Bell Telephone Company*, 2 FCC Rcd 2948, Para. 15 (1987). Therefore, although it would be preferable for the Commission to formally declare VOIP providers to be telecommunications carriers, it need not make that leap at this point. It

[4] *See, e.g.*, March 19, 2008 Letter from CommPartners to D&E Communications, attached hereto as Exhibit 1.

need only require that all such providers that terminate traffic on the PSTN – whoever they are – pay access charges which are required under the current regulatory regime and commensurate with the benefits that they receive. This is becoming even more critical as providers move more traffic to VOIP switching facilities. Notwithstanding the claims of VOIP providers used to justify avoidance of paying access charges, in migrating from the legacy switching environment to an IP switching environment the only difference is the technology used, not the nature of the service. In any case, when receiving traffic from LECs or handing off traffic to LECs, the traffic exchange format is typically TDM, not IP. Obviously, the network infrastructure of LECs cannot be maintained merely on the "good will" of the interconnecting carriers, but rather requires compensation to recover costs and assure the continuity of the network regardless of the method to traverse the PSTN.

Accordingly, if the Commission is to make any ruling at all about the applicability of access charges to interexchange IP-PSTN traffic, it must make it clear that access charges apply for identically provided incremental services regardless of how the VOIP provider classifies itself – telecommunications carrier or information service provider, and/or regardless of how the VOIP provider classifies its traffic – telecommunications or information service.

*B. The Petition's Proposals Regarding **Intra**state Access Charges Would Result in Improper Under-Recovery of Costs by LECs.*

The *Petition* seeks a Commission ruling that <u>inter</u>state terminating access charges apply to interstate interexchange IP-PSTN traffic. *Petition* at page 5. The Joint ROR Carriers support such a ruling, as it would make explicit what they know to be the current state of the law. However, when it comes to the application of <u>intra</u>state access charges to intrastate interexchange IP-PSTN traffic, the *Petition* adds an unexplained condition: access charges would only apply if the LEC's intrastate access rates are *equal or less than* its interstate access

rates. *Id.* This condition is perplexing since the logic of AT&T's petition is that ordinary access charges, whether interstate or intrastate should be applied to VOIP providers just as they are to similarly situated non-VOIP carriers. This bizarre requirement of rate parity appears to be an approach designed to gain political acceptance rather than an exercise of lawful rate regulation[5] and will, in at least two ways, result in a serious under-recovery of costs by LECs.

1. Intrastate Rates Have Been Found to Be Just and Reasonable, and LECs Rely on Such Rates to Recover Their Costs.

First, precluding LECs from billing intrastate access at their established intrastate rates will almost certainly result in shortfalls that leave LECs unable to recover significant portions of their cost of providing such access. It should be noted that many states have already enacted significant rate balancing resulting in lowering of intrastate rates. A LEC's current intrastate access rates have been approved by that LEC's state commission, and in the process of that approval, found to be just and reasonable for the recovery of the intrastate portion of the LEC's termination costs. LECs don't just want to recover such costs, they must recover such costs, in order to continue to provide the high quality service that their customers expect, and indeed, that they are required to provide by state commissions and the FCC. The PSTN that all users rely on, including the customers of VOIP providers, cannot be maintained over time if the carriers that are required to maintain it are prohibited from recovering their costs. IP-originated traffic is a rapidly growing portion of the traffic that LECs are terminating to the PSTN, and LECs should not be denied the ability to recover the just and reasonable costs of handling that traffic.

It is notable that the *Petition* recognizes that LECs will have to raise other rates in order to make up for costs not recovered through the application of lower-than-approved intrastate

[5] The Commission's statutory obligation is to engage in lawful, rational ratemaking, including ensuring proper cost recovery in situations where market forces alone would result in inadequate service to low population density areas.

access rates. In the waiver request in Section IV.B of the *Petition*, AT&T acknowledges that in states where approved intrastate access rates are higher than interstate rates, its own LEC operations will have to raise other rates in order to properly recover costs: it seeks to raise its originating interstate access rates and its SLC. However, as discussed below, these strategies may not be available to many LECs, especially rate-of-return LECs, and in those cases, AT&T would have the LEC fall short of recovering its costs. This is unjust, confiscatory, and fails from a policy perspective to preserve the integrity of the PSTN.

2. The Proposal in the *Petition* Will Encourage More Arbitrage.

The proposal that the Commission declare that intrastate access rates apply to intrastate, interexchange IP-PSTN traffic only if the rates are in parity with interstate rates will have at least one undesired but inevitable result: it will lead to an increase in regulatory arbitrage. Buried in note 18 of the *Petition* is the acknowledgment that in those states where intrastate rates are not in parity with interstate rates, the "status quo" would remain. Of course the status quo, as recognized in the *Petition* itself, is massive regulatory arbitrage, where VOIP providers refuse to pay proper access charges, and in many cases refuse to pay anything at all for the termination of their traffic. This maintaining of the "status quo" in those states is particularly ironic and disturbing because the apparent purpose of the *Petition* is to reduce regulatory arbitrage. Yet, if enacted, the proposal would not only fail to reduce arbitrage in non-parity states, it would likely create a neon-lit invitation for VOIP providers (and other carriers) to increase their use of pernicious arbitrage schemes which would favor one class of competitors over the others.

Because the treatment of IP-PSTN traffic would remain unchanged in non-parity states, VOIP providers will have a green light to reclassify their traffic as intrastate IP, since this ploy will maintain their unfair escape from paying compensation for termination of their traffic. In

addition, all other interexchange carriers will have a strong incentive to make questionable claims about the jurisdiction and/or format of their traffic, and as a consequence, refuse to pay access charges. So long as there is not a consistent and comprehensive application of the access charge burden to all traffic carriers (however denominated), the economics of arbitrage will immediately drive traffic toward the path of lowest cost and least resistance. This is not mere speculation – as the Commission well knows, the history of ICC regulation, especially in the last 12 years, shows that carriers will rapidly shift traffic classifications whenever new regulatory arbitrage opportunities arise.

The Joint ROR Carriers' solution to this anomaly in the AT&T proposal is simply to eliminate the exception. VOIP carriers should be required to pay interexchange access charges *regardless* of whether the traffic is interstate or intrastate. This is simply a corollary to the fundamental axiom that all carriers, regardless of the technology or protocol they use, whether IP or not, that hand off TDM-based traffic to PSTN LECs must accept the obligation to pay for exchange access under duly filed access based tariffs. Ordinary intrastate access charges which have already been tariffed and approved at the state level would apply to such traffic. A declaration from this Commission that such traffic is of the type that is subject to access charges should suffice to guide state commissions in any further tweaking of their intrastate regulatory regimes that might be necessitated by this determination.

C. The Petition's Access Charge Proposals Do Not Appear to Apply to Rate-of-Return LECs.

Lastly, the AT&T *Petition* is woefully deficient in that it purports to request a ruling that applies to the entire carrier industry, but in fact provides, at best, a proposal only for price cap carriers or, at worst, a proposal only for AT&T. As noted above, in states where intrastate access rates are higher than interstate access rates, LECs would not be able to recover a significant

portion of their costs. In order to remedy this unworkable situation for itself, AT&T requests a waiver to 1) reduce its intrastate access rate, 2) increase its SLCs, and 3) increase its Average Traffic Sensitive interstate originating access rates to no higher than the $0.0095 target approved in the CALLS Order for low-density price cap carriers. This approach may make AT&T whole, but it provides no remedy for hundreds of other carriers, particularly rate-of-return carriers. The FCC cannot rationally issue a ruling that creates havoc for hundreds of carriers, but provides a remedy for only a few.

The following issues are just a few of the ones that carriers other than AT&T would be left to struggle with:

- What if a LEC is in a state where it cannot quickly reduce its intrastate access rates, or cannot reduce them at all, under state commission rules and policies?
- What if a LEC is already charging the highest possible SLC allowed under FCC regulations thereby cutting off a SLC increase as an option for recovering revenues lost from access charges?
- What if a price cap LEC's Average Traffic Sensitive interstate access rates are already at the $0.0095 target approved in the CALLS Order for low-density price cap carriers?
- How can the full recovery of intrastate costs by LECs be assured when the proposed new cap on intrastate access rates bears no rational relationship to intrastate costs?

Even more problematic is AT&T's proposal that LECs should just raise their interstate access rates if they need to recoup lost revenues. This is particularly problematic for ROR LECs that do not have their own interstate tariff, but rather participate in the NECA tariff. Carriers that participate in the NECA tariff do not have the ability to individually increase their interstate access rates. These rates are developed and set by NECA in accordance with Part 69 of the

Commission's rules, for use by all carriers that participate in the tariff. How will a single NECA tariff be modified to recoup losses on the intrastate side, when its members operate under numerous different state regimes, with numerous different state rates? How can LECs reflect increased costs to be recovered from the interstate pool when separations factors have been frozen? In addition to needing to revise its interstate access rates, NECA would also need to modify its settlements process to ensure that the increased revenues due to increased interstate access rates found its way to the carriers as increased interstate access revenue.[6] In the absence of these highly problematical steps – steps which could hardly be taken on an expedited, "interim" basis – many rate-of-return carriers would simply be unable to recover their intrastate costs. Such a plan is necessarily unjust and unreasonable, and would result in confiscatory rates.

The above are just some of the thorny cost recovery issues that the *Petition* adroitly sidesteps. In essence, the *Petition* ignores ROR carriers. If it is intended to apply to ROR carriers, the *Petition* does not recognize the magnitude to which such carriers depend on intrastate access charge revenues for a significant and necessary financial contribution toward recovery of the cost of their operations. In any case, the *Petition* attempts to impose jurisdictional rate parity on all carriers, but proposes no workable or valid solutions for ROR carriers to achieve such parity. As a result, ROR carriers will be targets for even more arbitrage, and will be less able to recover their costs. Accordingly, because the *Petition's* piece-meal approach to IP-PSTN interexchange traffic does not address or accommodate a significant class of carrier, it should not be enacted by the Commission.

[6] A NECA carrier's interstate revenues increase when settlements increase, not when rates increase.

III. Procedural and Jurisdictional Issues Preclude the Relief Requested by AT&T.

Apart from the other issues raised by AT&T's Petition, the particular vehicle it has chosen presents obstacles to the grant of the relief requested. Clearly the issues raised by AT&T are far-reaching and will have a dramatic impact not only on AT&T but on all carriers. Some of the proposals, such as the effective cap on intrastate access charges which could be applied, are plainly an attempt to end-run the normal notice and comment rulemaking procedures mandated by the Administrative Procedure Act ("APA") when adopting a regulation with the force of law. That proposal also seems to intrude on the jurisdiction of state PUCs to regulate intrastate rates via the backdoor of a declaration that a certain intrastate rate level "would not violate federal policy." The Joint ROR Carriers appreciate the need for speedy action, but the requirements of the APA and the jurisdictional limits on the Commission's power to regulate intrastate rates cannot be danced around so easily.

On the other hand, to the extent that AT&T is simply requesting a declaratory ruling that VOIP traffic is a category of communications traffic whose termination must be compensated by the payment of access charges, without a condition based on intrastate rate levels, such a declaration is clearly within the FCC's present authority to issue. See, for example, *Vonage Holdings Corp. Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, 19 FCC Rcd 22404 (200), *aff'd*, *Minn. Pub. Utils. Comm'n v. FCC*, 483 F. 3d 570 (8th Cir. 2007).

IV. Conclusion

For the reasons set forth above, the Joint ROR Commenters urge the Commission (i) to act promptly and comprehensively to declare that jurisdictional access charges apply to all interexchange traffic originated and terminated by a LEC on the PSTN, regardless of whether the

traffic is intrastate or interstate, and regardless of the technology or format used to originate the call, (ii) to reject AT&T's proposal to limit the intrastate application of such a ruling only to LECs whose intrastate access charges are not greater than their interstate access charges, (iii) to recognize that elimination of intrastate cost recovery mechanisms as proposed by AT&T could not be easily or quickly remedied by adjustments in the NECA tariffs, resulting in significant unrecovered costs for many carriers, (iv) to eliminate asymmetrical arbitrage by requiring consistent treatment of IP-originating traffic, and (v) to reject the attempt to effectively adopt new rules for the industry without complying with the mandatory procedures applicable to notice-and-comment rulemaking proceedings.

Respectfully submitted,

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August 21, 2008

EXHIBIT 1

CommPartners™

THE IP NETWORK AND VOIP SOLUTIONS PROVIDER

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March 19, 2008

D&E Communications

Re: Disputed invoice(s). Ban(s): DEY2666301 & BVT2666301

To Whom It May Concern:

We are in receipt of an invoice for the billing account number ("BAN") referenced above. Please be advised that the billed party, CommPartners, is disputing the invoice in full. Based on CommPartners records, it appears that the invoice relates to originated traffic in the format of voice over Internet protocol ("VoIP"), i.e., initiated by our end user as an Internet protocol ("IP") stream. Because this traffic represents VoIP transmissions rather than circuit-switched telephone calls, your company is not entitled to collect access charges on these calls. By definition, switched access charges are authorized by Title II of the Communications Act. CommPartners believes, as do most others in the VoIP industry, that VoIP traffic is more properly classified as Title I information/enhanced services. As the FCC has stated numerous times, in order for traffic to qualify as an enhanced service, the traffic must undergo a net protocol conversion.. CommPartners' traffic begins at the end user premise as an IP stream, usually via an analog telephone adapter or VoIP handset. Before your company can terminate this traffic to your end users, CommPartners must convert the IP signal into time division multiplexing format. That constitutes a net protocol conversion under FCC enhanced service rules. As such, this traffic is not subject to Title II switched access charges, regardless of any tariff references to the contrary.

CommPartners understands that this issue is currently the object of much debate at the Federal Communications Commission ("Commission"), specifically in the *IP Enabled Services* docket[1] and the *Intercarrier Compensation Reform* docket[2]. In the *AT&T Declaratory Ruling*[3], the Commission specifically noted that although AT&T's "IP in the middle" services were subject to access charges, the FCC was not applying this to IP-originated calls. The Commission reserved the right to do so in the future, noting that its decision "in no way precludes the Commission from adopting a fundamentally different approach when it resolves the IP services rulemaking, or when it resolves the *Intercarrier Compensation* proceeding." This specific issue is also currently part of two petitions for forbearance, one by Embarq, the other by Feature Group IP. After these proceedings are completed and their results become final and non-appealable, CommPartners will comply with any federal or state requirements to pay access charges prospectively. Until that time, however, CommPartners refuses to pay access charges on any IP-originated traffic originated by CommPartners' end users and terminated by your company.

Should there be any questions or additional information required, please do not hesitate to contact me at 702 367-8647 ext. 1079. Thank you.

Sincerely,

Kristopher E. Twomey
Regulatory Counsel

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[1] *In the Matter of IP Enabled Services, Notice of Proposed Rulemaking*, WC Docket No. 04-36 (Released March 10, 2004).

[2] *In the Matter of Access Charge Reform, Notice of Proposed Rulemaking*, CC Docket No. 96-488.

[3] *Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges, Order*, WC Docket No. 02-361, FCC 04-97 (April 21, 2004) ("*AT&T Declaratory Ruling*").